Chan Sang & Anor v Golden Century Development Sdn Bhd & Anor and other actions

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NOS 354–1980, 337–1980, 351–1980, 363–1980, 45–1981, 62–1981, 123–1981, 26–1983, 715–1984
ABDUL MALEK J
22 OCTOBER 1994

Civil Procedure *— Contempt of court — Committal proceedings — Leave to issue — Whether registrar has power to grant leave to issue committal proceedings — Whether application for leave must be made to judge — Rules of the High Court 1980 O 32 r 9, O 52 rr 1, 2 & 3*

The applicants had, in earlier proceedings, obtained an order against the respondents requiring the respondents to execute valid and registrable memoranda of transfer in their favour in respect of certain land and deposit the same together with the issue documents of title in court, failing which the respondents and a director of theirs would be liable to the process of execution for the purpose of compelling them to obey the order. The respondents failed to comply fully with the order and the applicants filed a notice of motion to commit a director of the respondents to prison for contempt. The application for leave to issue the commital proceedings was made to the senior assistant registrar in chambers. Counsel for the respondents challenged the validity of the application for leave and argued that it should have been made to a judge in open court.

Held, dismissing the application for committal proceedings:

(1) Under O 32 r 9 of the Rules of the High Court 1980, the registrar can only do what a judge can do in chambers but not what a judge can do in open court, unless otherwise directed by the Chief Justice.

(2) An order of committal can only be made by a judge of the High Court under O 52 r 1 and, as such, applications for leave under O 52 r 2(1) must be made to a judge of the High Court as the word 'Court' in O 52 r 2(1) must mean a judge of the High Court. Furthermore, the word 'motion' in O 52 r 3(1) clearly denotes that the application for leave must be made to a judge of the High Court in open court and not in chambers.

(3) Although O 52 r 2(2) states that applications for leave may be made to a judge-in-chambers when the court is in vacation, the word 'Court' in O 52 r 2(2) does not include the registrar as it would be illogical to require applications for leave to be made to the judge-in-chambers only during court vacations while at other times, the applications may be made to the registrar.

(4) The application for leave under O 52 should have been to a judge in open court when the High Court was in session or to a

judge-in-chambers if it was in vacation and not to the registrar-in-chambers as in this case. As the registrar had no jurisdiction to deal with the matter, the leave obtained could not be a 'proceeding' under O 2 r 1(1) and was not a mere irregularity but a nullity.

[Bahasa Malaysia summary

Pemohon telah mendapat suatu perintah terhadap responden di dalam prosiding terdahulu yang menghendaki responden menyempurnakan beberapa memorandum pindahmilik yang sah dan boleh daftar berkaitan dengan tanah tertentu dan mendepositkan memorandum itu bersama dengan dokumen hakmilik keluaran di mahkamah, dan jika mereka gagal berbuat demikian, responden dan seorang pengarah mereka akan dikenakan proses pelaksanaan bagi tujuan memaksa mereka supaya mematuhi perintah itu. Responden gagal mematuhi perintah itu sepenuhnya dan pemohon telah memfailkan suatu notis usul untuk mengkomitkan seorang pengarah responden kepada penjara kerana penghinaan mahkamah. Permohonan untuk kebenaran mengeluarkan prosiding komital itu telah dibuat kepada penolong kanan pendaftar dalam kamar. Peguambela bagi pihak responden telah mencabar keesahan permohonan untuk kebenaran itu dan berhujah bahawa ia sepatutnya dibuat kepada seorang hakim di mahkamah terbuka.

Diputuskan, menolak permohonan untuk prosiding komital:

(1) Di bawah A 32 k 9, pendaftar hanya boleh melakukan apa yang seorang hakim boleh lakukan di dalam kamar tetapi bukan apa seorang hakim boleh lakukan di mahkamah terbuka, kecuali jika diperintahkan selainnya oleh Hakim Besar.

(2) Suatu perintah komital hanya boleh dibuat oleh seorang hakim Mahkamah Tinggi di bawah A 52 k 1 dan, dengan demikian, permohonan untuk kebenaran di bawah A 52 k 2(1) mesti dibuat kepada seorang hakim Mahkamah Tinggi kerana perkataan 'Mahkamah' di dalam A 52 k 2(1) mesti bermakna seorang hakim Mahkamah Tinggi. Lebih-lebih lagi, perkataan 'usul' di dalam A 52 k 3(1) jelas bererti bahawa permohonan untuk kebenaran mesti dibuat kepada seorang hakim Mahkamah Tinggi di mahkamah terbuka dan bukan di dalam kamar.

(3) Walaupun A 52 k 2(2) menyatakan bahawa permohonan untuk kebenaran boleh dibuat kepada hakim di dalam kamar apabila mahkamah bercuti, perkataan 'Mahkamah' di dalam A 52 k 2(2) tidak termasuk pendaftar kerana ianya tidak munasabah jika permohonan untuk kebenaran dikehendaki dibuat kepada hakim di dalam kamar hanya apabila mahkamah bercuti manakala pada masa lain, permohonan boleh dibuat kepada pendaftar.

(4) Permohonan untuk kebenaran di bawah A 52 seharusnya dibuat kepada seorang hakim di mahkamah terbuka apabila Mahkamah Tinggi bersidang atau kepada hakim di dalam kamar jika

mahkamah bercuti dan bukan kepada pendaftar dalam kamar seperti di dalam kes ini. Oleh kerana pendaftar tidak mempunyai bidangkuasa untuk mendengar perkara itu, kebenaran yang diperolehi itu tidak menjadi suatu 'prosiding' di bawah A 2 k 1(1) dan ianya bukan semata-matanya suatu luar aturan tetapi ialah suatu pembatalan.]

Notes

For cases on committal for contempt of court, see 2 *Mallal's Digest* (4th Ed) para 572; [1989] Mallal's Digest 312; [1991] Mallal's Digest 239, 242; [1992] Mallal's Digest 202; [1993] Mallal's Digest 145.

Cases referred to

EG Tan & Co (Pte) (in liquidation) v Tan Chong San [1993] 1 MLJ 256 (distd)

Harkness v Bell's Asbestos & Engineering Ltd [1967] 2 QB 729; [1966] 3 All ER 843; [1967] 2 WLR 29 (distd)

Tan Chew Wah v Teo Kang Swee [1934] MLJ 139; [1934] SSLR 297 (distd)

Legislation referred to

Rules of the High Court 1980 O 1 r 4(2), O 32 r 9, O 52 rr 1, 2, 3
Limitation Act 1963 s 1 [UK]
Limitation Act 1939 s 2(1) [UK]
Rules of the Supreme Court O 2 r 1, O 128 r 1(1) [Eng]

Tan Jin Wah (*Tan & Tan*) for the applicants.
P Suppiah (*J Singh & Co*) for the respondent.

Abdul Malek J: It is relevant to start off by stating that I had been assigned to come from Kuala Lumpur to do this case by the Chief Judge of the High Court Malaya as all the learned judges stationed at the High Court at Johor Bahru had disqualified themselves from hearing the matter.

Similar orders had been made on the 18 January 1987 for the first seven of the nine cases and it is necessary for our purpose to reproduce only the order at prayer (b) for the first case which is:

> That Jet Age Construction Sdn Bhd do execute a valid and registrable memorandum of transfer in favour of the plaintiffs in respect of the qualified title No HS(D)19243 for Lot No TLO 10397 and deposit the same together with the issue document of title in respect of the land aforesaid in this court within one month from the date hereof and in the event of default the senior assistant registrar of this court shall be empowered to execute all the relevant documents and perform all the necessary acts on behalf of the first and/or the second defendant to give effect to this order.

What is more relevant, of course, is the indorsement at the end of the order which reads:

A If you, the within-named Golden Century Development Sdn Bhd and Jet Age Construction Sdn Bhd, neglect to obey this order by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same.

If Golden Century Development Sdn Bhd and Jet Age Construction Sdn Bhd neglect to obey this order by the time therein limited, you, B Jaginder Singh, a director of the said Golden Century Development Sdn Bhd and Jet Age Construction Sdn Bhd, will be liable to process of execution for the purpose of compelling the said Golden Century Development Sdn Bhd and Jet Age Construction Sdn Bhd to obey the same.

Consequently, on the 14 October 1989, the following notice of motion C was filed:

Notice of motion

Take notice that pursuant to the leave of this court given on the 8th day of October 1989 the court will be moved on Rabu (Wednesday), the 1st day of November 1989 at 9am or so soon thereafter as counsel can be heard, by D counsel for the abovenamed applicants for an order :

1 That Jaginder Singh of No 41 Jalan Waspada, Johor Bahru, as a director of Jet Age Construction Sdn Bhd, do stand committed to Johor Bahru Prison for his contempt in not paying obedience to the order of court made on the 18th day of January 1987 ordering the said E defendant, Jet Age Construction Sdn Bhd, to do the following acts within one (1) month from the date of the order:

...

(2) In connection with the aforesaid Johor Bahru High Court Civil Suit No 354 of 1980, do execute a valid and registerable memorandum of transfer in favour of Chan Sang and Chan Yoke F Fong in respect of qualified title No HS(D)19243 for Lot No TLO 10397 and deposit the same together with the issue document of title in respect of the land aforesaid in the High Court, Johor Bahru.

...

2 That the said defendant, Jet Age Construction Sdn Bhd, and/or Jaginder G Singh, do pay the above-named applicants their costs of and incidental to this application and also of the issuing and execution of such order of committal to be made hereon.

3 That the costs of and occasioned by this motion be paid by the said defendant, Jet Age Construction Sdn Bhd, and/or Jaginder Singh, and also of the issuing and execution of any such order of committal to be H made hereon.

And further take notice that the applicants intend to read and issue in support of this application the statement and affidavit of Tan Hock Kim filed herein on the 21st day of March 1987, and the several exhibits thereunto respectively annexed, in support of the application I for leave under O 52 r 2 of the Rules of High Court 1980, copies of which statement, affidavit and exhibits are intended to be served together with this notice of motion.

Dated this 14th day of October 1989

Senior assistant registrar
High Court Malaya
Johor Bahru.

The acts described in the other sub-paragraphs of para 1 are similar to the one reproduced in sub-para (2) thereof.

At the outset, learned counsel for the plaintiffs (hereinafter 'the applicants') had applied to delete the name of Jaginder Singh (hereinafter 'the respondent') in prayer 2 and to withdraw prayer 3 as it was repetitive. It would be more of an understatement to say that I was also quite shocked that the matter had not been heard for five years despite the fact that learned counsel for the applicants had explained that it was partly due to the appeal against the original order pending in the then Supreme Court which had been dismissed only on 27 April 1989. That, to my mind, could only result in the delay in filing the notice of motion but certainly could not have delayed the hearing of the matter.

He had also submitted that O 52 (hereinafter 'the relevant Order') of the Rules of the High Court 1980 (hereinafter 'the Rules') had been complied with. The application for leave to commit the respondent for contempt had been filed by way of summons-in-chambers as early as 1 April 1987 but it was granted by the learned senior assistant registrar (hereinafter 'the registrar') only on 8 October 1989 and the notice of motion filed on 14 October 1989 had been served on the respondent on 18 October 1989. It is also quite clear here that there had been a delay of about two and a half years in the hearing of the application for leave itself, but this of course must be due to the pending appeal in the then Supreme Court as regards the original order dated 18 January 1987.

While that appeal was pending, there was an order for stay granted on 9 September 1987. The appeal was dismissed on 27 April 1989 and as stated by learned counsel for the applicants, the respondent was to comply with the original order by 18 February 1987 and following the stay pending appeal obtained after that date, there had been no compliance with the order even after the dismissal of the appeal on 27 April 1989 until 5 December 1989 when only four of the seven documents of title were handed over by the respondent.

Learned counsel had further gone on to state that the alternative limb in the order which provided for the registrar to execute all the relevant documents in the event of default by the defendants did not relieve the defendants from the obligation as the court was not in a position to transfer all the documents to itself. The defendants had also presented a winding-up petition against itself on 4 November 1989 with the intention of rendering the transfers null and void. He reiterated that the authorities are clear that directors must ensure compliance with court orders against companies and if a director was found guilty of contempt, he was subject to committal proceedings. In this case, there had only been partial compliance of the ordsr some two years and ten months later and he had accordingly asked for the order in terms but had left the punishment to the court.

A Learned counsel for the respondent had enunciated that there was in fact the alternative in the order for the registrar to execute the transfers if the company failed to do so and that it was not proper to punish just the respondent when there were two other directors as well especially when a single director could not execute the transfers on behalf of the company. He argued that the authorities cited were not relevant as they concerned B injunctions and the orders in those cases were to prevent damages in the event the injunctions had not been complied with. In any case, he added, the company had subsequently complied with the order. He had explained that the delay was caused by the fact that the title deeds were actually with the second purchasers' solicitors even before the relevant court order had C been granted.

The next issue raised by learned counsel for the respondent was the fact that leave to issue committal proceedings had been done ex parte before the registrar in chambers. He was of the view that the procedure was not correct as the application for leave should have been before the D judge in open court. At that stage, learned counsel for the applicants had replied that everything had been done in compliance with the relevant Order. However, during the adjournment pending the decision, learned counsel for the respondent had sent in a written submission on 12 September 1994 to further elaborate on this point and, accordingly, learned counsel for the applicants had also sent their reply on 23 September 1994.

E To my mind, this is the crux of the matter and has to be determined first before any necessity arises as to the deliberation of the other points raised. It is pertinent to point out that I had, in the course of going through the file before the hearing began, happened to enquire from the very same registrar as to who had granted the leave and he had told me that he had F done so. It had occurred to me then that that was quite unusual as for all the contempt matters that I had heard previously, it had always been that leave was granted by me as judge in open court. This issue, in my view, raises a very important point of jurisdiction as it has now been argued that a registrar of the High Court cannot grant leave under the relevant Order mindful of the fact that the registrar in question had actually done so in G chambers on 8 October 1989.

The problem becomes more pronounced because in the relevant Order certain functions are not exercisable by the registrar but only by a judge of the High Court as in r 1(3) and (4) which clearly state that an order of committal may only be made by a judge of the High Court H although in r 2 the words 'a judge of' is missing for a similar provision. But it is r 2 of that Order which has given rise to this issue and it is appropriate to reproduce it in full at this stage:

(1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been I granted in accordance with this rule.

(2) An application for such leave must be made ex parte to the Court, except in vacation when it may be made to a Judge in Chambers, and must be supported by a statement setting out the name and description

> of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

For the meaning of the word 'court' it is necessary to read O 1 r 4(2) of the Rules which states:

> In these rules, unless the context otherwise requires, 'Court' means the High Court or any one or more Judges thereof, whether sitting in Court or in Chambers, or the Registrar; but the foregoing provision shall not be taken as affecting any provision of these rules and, in particular, Order 32, rule 9, by virtue of which the authority and jurisdiction of the Registrar is defined and regulated.

It may also be convenient at this juncture, because of it being referred to in the previous paragraph, to set out exactly what O 32 r 9 says about the jurisdiction of the registrar and which is:

> The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these rules may be transacted and exercised by a Judge in Chambers except such business, authority and jurisdiction as the Chief Justice may from time to time direct to be transacted or exercised by a Judge in person or as may by any of these rules be expressly directed to be transacted or exercised by a Judge in person.

It is also proper to point out that from the reading of the above rule, it is amply clear that the registrar can only do what a judge can do in chambers but not what a judge can do in open court, except when directed otherwise by the Chief Justice.

If we look at 'No application to a Court for an order of committal against any person may be made unless leave ... ' in r 2(1) of the relevant Order, the word 'Court' must surely mean 'a Judge of the High Court' as the preceding r 1 has respectively made it clear that an order of committal can only be made by a Judge of the High Court. As to whether it is to the judge of the High Court in chambers or in open court, the answer is provided in r 3(1) of the relevant Order which says that, 'When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion to the Court ...'. The word 'motion' clearly denotes that it must be made to a judge of the High Court in open court and not to a judge in chambers.

The problematical part is of course r 2(2) of the Order which states that, 'An application for such leave must be made ex parte to the Court, except in vacation when it may be made to a Judge in Chambers, ...'. Does the word 'Court' there include the registrar as envisaged by O 1 r 4(2) of the Rules? I would think not as it would mean that it is made to a judge in chambers only during court vacations as ordinarily at other times it may be made to the registrar when the court is in session. And why cannot you apply to the registrar when the court is in vacation? In fact, it would be more logical to have it the other way round, that is, to apply to a judge

when the court is in session and to the registrar when the court is in vacation.

This is best explained, however, by the fact that this rule and the relevant Order were taken from the Rules of the Supreme Court in England except that there the words 'Divisional Court' appear instead of 'Court' for the relevant Order. This would make more sense as it would mean that while the court is in session, the application must be made to the Divisional Court, which is two judges of the High Court sitting together to hear appeals or case stated on points of law from inferior courts, and to a judge in chambers when it is in vacation. I can only surmise that there has been a drafting slip-up somewhere in copying the English Rules which has led to our present predicament. For local purposes, therefore, the application for leave should be made ex parte to a judge of the High Court in open court while it is in session and to a judge in chambers when it is in vacation.

Having decided that, it is proper to make reference to r 3(1) of the Order where, ' ... unless the Court or Judge granting leave ... ' must surely only be consequential to r 2(2) and does not actually indicate that 'Court' is to include the registrar as well. A proper reading of the relevant Order in its entirety and not each rule separately would suggest that the word 'Court' does not include the registrar, and as for the definition of 'Court' in O 1 r 4(2), the relevant Order must be construed as being one of the situations 'where the context otherwise requires'. It is also relevant to state that on 8 October 1989, the High Court was not in vacation as seen from PU(B) 17 of the Government *Gazette* published on 12 January 1989.

On these considerations, I can only conclude that the application for leave under the Order had been wrongly made as it should have been to a judge in open court when the High Court was in session or to a Judge in chambers if it is in vacation and not to the registrar in chambers as what had happened in this case. To my mind, the application for leave is the root of the committal proceedings and any non-compliance of the procedure prescribed cannot merely amount to an irregularity but it would actually nullify the proceedings.

I have been made aware of *Harkness v Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729; [1966] 3 All ER 843; [1967] 2 WLR 29, where the plaintiff had applied by virtue of s 1 of the Limitation Act 1963 for leave that s 2(1) of the Limitation Act 1939 should not afford a defence to his proposed action for damages for personal injuries which application was made by affidavit to a district registrar who accordingly granted it. Order 128 r 1(1) of the Rules of the Supreme Court, however, required that the jurisdiction should be exercised by a judge in chambers in person and, therefore, the district registrar had no jurisdiction to give leave. On the application of the defendants to set aside the order, the judge took the view that the order was a nullity and made no order. On appeal from the refusal of a subsequent application by the plaintiff that the order of the district registrar should be rectified and treated as valid, it was held by the Court of Appeal that the original application to the district registrar was a

'proceeding' within O 2 r 1 of the Rules of the Supreme Court with the consequence that the failure to comply with O 128 r 1(1) did not render the application a nullity but amounted only to an irregularity and the defect in the district registrar's order could be amended. Although this authority had been cited by learned counsel for the applicants, it actually works in favour of the respondent because in our present circumstances, the leave obtained from the registrar in chambers cannot be held to be a 'proceeding' under O 2 r 1(1) and it certainly cannot amount to an irregularity but a nullity as it should not have taken place at all irrespective of whether the High Court was in session or in vacation on 8 October 1989. To put it simply, the registrar had no jurisdiction to deal with the matter. Since it is not an irregularity, the case of *Tan Chew Wah v Teo Kang Swee* [1934] MLJ 139; [1934] SSLR 297 and my previous ruling in *EG Tan & Co (Pte) v Tan Chong San* [1993] 1 MLJ 256 are not applicable here. Similarly, the learned counsel for the applicants' argument that the respondent had taken fresh steps after knowing of the irregularity, implying that they had waived that point, has no merit in these circumstances.

Accordingly, I find that no proper committal proceedings are before this court and would order that this notice of motion be dismissed with costs.

Application dismissed.

Reported by Anne Khoo